No. 93-617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MAGNOLIA BAR ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ARMIS E. HAWKINS, CHIEF JUSTICE OF THE SUPREME COURT OF MISSISSIPPI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF ALL PARTIES

The parties to the proceeding below were the petitioners, Magnolia Bar Association, Inc., Mississippi State Conference of the National Association for the Advancement of Colored People, Rainbow Coalition, Mississippi Association of Black Supervisors, Mississippi Conference of Black Mayors, George Flaggs, Bennie Thompson, Sheila Johnson, and Sam McCray, and the respondents, Armis E. Hawkins, Dan M. Lee, Lenore L. Prather, Michael D. Sullivan, Fred L. Banks, Jr., Chuck R. McRae, Edwin Lloyd Pittman, James L. Roberts, Jr., and James W. Smith, Jr., Justices of the Supreme Court of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, Kirk Fordice, Governor of the State of Mississippi, Dick Molpus, Secretary of State of the State of Mississippi, and Members of the State Board of Election Commissioners. The Mississippi Republican Party Executive Committee and the Mississippi Democratic Party Executive Committee were dismissed from active participation prior to trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-647

MAGNOLIA BAR ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ARMIS E. HAWKINS, CHIEF JUSTICE OF THE SUPREME COURT OF MISSISSIPPI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION [1]

INTRODUCTION

Respondents, Armis E. Hawkins, Chief Justice of the Supreme Court of Mississippi, et al., respectfully pray that this Court deny petitioners' request that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 994 F.2d 1143 (5th Cir. 1993). It is plainly consistent with the decisions of this Court.

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[1] The respondents are separated into two distinct bodies. The first consists of members of the Mississippi Supreme Court. The second consists of members of the State Election Commission. This pleading represents the position of all respondents herein. The state Republican and Democratic parties were dismissed from active participation prior to trial. The political parties are not respondents herein.

STATEMENT OF THE CASE

The Supreme Court of Mississippi is composed of nine justices elected from three districts. The districts are formed by boundary lines running east and west across the state. The districts are of roughly equal geographic area and include diverse interests of the state. Three justices are elected on an at-large basis from each district. Justices are elected to staggered terms from designated "post" positions. The districts are referred to as the Northern, Southern, and Central Districts. Two black Supreme Court candidates have defeated well known white opponents by receiving substantial white support and votes.

By this Section 2 Voting Rights Act proceeding, the petitioners challenge Mississippi's long established structure of constituting its Supreme Court. Petitioners' original complaint set forth two distinct challenges. The first challenge has generally been labeled the "multimember" claim. Under this claim the plaintiffs challenge the fact that justices are elected on at-large basis from the three districts. The second challenge is generally called the "line" claim. Under this thory the petitioners challenge the fact that the boundary lines are drawn in an east-west configuration. The petitioners sought the establishment of nine single-member districts. As an alternative matter of relief, the petitioners asked the District Court to impose cumulative or limited voting in Supreme Court elections.

The case was tried in the Southern District of Mississippi by Judge William H. Barbour, Jr., who had previously found Section 2 violations in the election of trial judges in certain of the Mississippi chancery and circuit court districts in *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987). The District Court found that petitioners, in their multimember challenge, failed to prove the *Thornburg v. Gingles*, 478 U.S. 30 (1986), preconditions and also failed to satisfy the totality of the circum-

stances test set forth in Section 2, and in *Thornburg*. The District Court also ruled that the petitioners failed in their "line" challenge. The Court found that, even though the petitioners satisfied the *Thornburg* preconditions in the line challenge, under the "totality of the circumstances" test the petitioners failed. The District Court concluded under both challenges that the state's strong interest in electing justices from large and diverse districts which fosters judicial independence, coupled with the absence of white bloc voting in the Central District, together with minority electoral success in Central District races and in Mississippi generally, outweighed the factors petitioners proved under the totality of the circumstances test.

On appeal, the Fifth Circuit ruled that the petitioners had failed to show legally significant white bloc voting in their multimember challenge, and that the District Court did not err in finding that boundary line configurations could not be changed so as to create a black majority voting age population district.[2] The Fifth Circuit interpreted petitioners' challenges as also including a "hybrid" line-drawing/multimember claim. The Fifth Circuit held that this claim was foreclosed by petitioners' failure to prove legally significant white bloc voting in the Central District. Accordingly, the District Court judgment was upheld.

[2] The Fifth Circuit noted that petitioners did not challenge the District Court's findings on this issue. (Supp. App. 16a)

REASONS FOR DENIAL OF THE WRIT

I. THREE OF THE FIVE QUESTIONS PRESENTED IN THE PETITION ARE NOT RAISED BY THE DECISION BELOW OR WERE NOT PRESENTED TO THE FIFTH CIRCUIT FOR DECISION.

The first and second questions presented by petitioners would have this Court decide whether a district court may consider totality of circumstances evidence in determining whether the *Thornburg* preconditions have been met. The fourth question presented by petitioners is whether *total* black population or *voting age* black population is the necessary inquiry in determining the numerosity element in the *Thornburg* preconditions. These three questions were not among the fourteen issues argued to and decided by the Fifth Circuit (Brief App. 1a-3a).[3] In fact, at trial the petitioners argued that voting age population was the relevant inquiry. Petitioners urged the District Court to follow the Seventh Circuit's decision in *Dickerson v. Indiana State Election Board*, 933 F.2d 497, 503 (7th Cir. 1991), which held that a bare majority in black voting age population was sufficient to satisfy the numerosity requirement of *Thornburg*. (Brief, App. 4a) Petitioners seek through their fourth question presented to have this Court review the District Court's conclusion that a new three-judge district having a black voting age majority could not be drawn in a north-south direction. The Fifth Circuit held that petitioners had failed to appeal this finding of the District Court. (Supp. App. 16sa) Likewise, petitioners did not challenge the District Court's findings that black voting age majority subdistricts could not be created in the Northern and Southen Supreme Court Districts (Brief, App. 8a)

This Court held in *Duignan v. United States*, 274 U.S. 195, 200 (1927) "It is only in exceptional cases coming

[3] Citations to (Brief, App.) are to the Appendix to Respondents' Brief in Opposition.

here from the federal courts that questions not pressed or passed upon below are reviewed." Petitioners failed to appeal the issue presented in their fourth question and failed to raise or press the issues presented as their first and second questions. The Fifth Circuit did not pass upon these questions in this case. The Fifth Circuit expressly held "Accordingly, we do not reach the plaintiffs' arguments with respect to the District Court's findings under the totality of circumstances inquiry. (footnote omitted" Supp. App. 12sa)[4] The questions presented in this case are not exceptional.

II. THE TWO QUESTIONS PRESENTED THAT ARE PROPERLY BEFORE THE COURT ARE NOT SUBSTANTIAL QUESTIONS AND DO NOT SET FORTH BROAD LEGAL PRINCIPLES WORTHY OF THIS COURT'S REVIEW.

The petitioners' third and fifth Questions Presented are properly before the Court. The third question is whether the lower courts placed too much emphasis on the fact that in the predominantly white Central Supreme Court District, two black Supreme Court candidates had defeated two well known white opponents. The weight and importance that should be given such a factual circumstance is purely a function of this one proceeding. No broad legal principle could be derived from the peculiarities of this proceeding that could be generally applied to other proceedings. This Court does not exist to correct errors. It exists to create policy that will guide inferior courts. The question of what weight should or should not have been given to a particular piece of evidence in the trial in this cause does not present the Court an opportunity to create or shape policy.

The petitioners' fifth question is whether the Fifth Circuit had the authority to substitute its judgment for

[4] Citations to (Supp. App.) are to the lower court opinions set forth in the Supplemental Appendices to the petition.

the trial court's finding of legally significant white bloc voting in the line challenge aspect of the case. The petitioners view this as a fact question and, therefore, irreversible except upon a finding of clear error. This Court held in *Thornburg* that a district court's finding of fact is not entitled to deference if based on a misunderstanding of the governing rule of law. 478 U.S. at 79. The Fifth Circuit's ruling was a legal one. The Fifth Circuit found as a matter of law that the District Court's examination was not sufficiently district specific. The District Court's findings were, therefore, meaningless rather than necessarily erroneous. The Fifth Circuit merely held that an examination of properly district specific data revealed an absence of legally significant white bloc voting. In any event, the Fifth Circuit's ruling on this point was a legal ruling, and the Fifth Circuit was, of course, under no duty to accord deference to the District Court's ruling on this point.

III. EVEN SHOULD THIS COURT CONSIDER THIS CASE TO BE PROCEDURALLY SUITABLE FOR REVIEW, THE QUESTIONS OF LAW SOUGHT TO BE PRESENTED HAVE BEEN PREVIOUSLY DECIDED BY THIS COURT OR BY UNANIMOUS AGREEMENT AMONG THE CIRCUIT COURTS.

The first issue presented is, as stated above, contained in the first two Questions Presented. The discrete question is whether "totality of the circumstances" proof can be used to decide whether the *Thornburg* preconditions have been met. This question was answered in *Thornburg* where it was stated:

> If difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination that appeals to racial bias are employed in election campaigns

> and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the multimember district. (*Id.*, p. 49, n.15)

This language shows that, in the absence of legally significant white bloc voting, matters which would constitute "totality of circumstances" factors are irrelevant. In effect, the petitioners are asking this Court to overrule *Thornburg*. The petitioners present nothing in their petition which suggests any reason the Court might need to revisit this issue.

Petitioners contend that the Fifth Circuit decision in the instant case is in conflict with the Eleventh Circuit's holding in *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992), *cert. granted sub nom. Holder v. Hall*, 61 U.S. L.W. 3596. The narrow holding in *Hall* is limited to situations where election data and derivative statistical information are systematically unavailable. There was no such finding in the instant case. Any conflict between the *Hall* decision and this case has already been resolved by this Court in *Thornburg, supra*. Certiorari was granted in *Holder v. Hall* on March 1, 1993 on an entirely different question. Oral argument was presented in *Holder* on the first day of the October, 1993 term.

It is important to understand that the Fifth Circuit has not embraced a mechanical application of the *Thornburg* preconditions. The Fifth Circuit has already ruled that it is acceptable to use non-expert testimony in establishing racially polarized voting. *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 (5th Cir. 1991). Moreover, the Fifth Circuit rejected petitioners' argument in this case that the District Court was required to rely on only expert conclusions. The Fifth Circuit held that the District Court could properly examine the circumstances surrounding the analyzed elections, together with the election results, and determine for itself whether certain elections were aberrational or

whether white voters usually voted to defeat the preferred candidates of minority voters. (Supp. App. 15sa). However, the issue of whether matters which would constitute "totality of circumstances" conditions could also be used to determine the *Thornburg* preconditions was not raised by petitioners. Again, as set forth above, respondents submit that this question has already been decided by *Thornburg*.

The next legal question the petitioners would have this Court consider relates to the relevant inquiry for determining the numerosity component of the *Thornburg* test. The petitioners submit. for the first time, that *total* black population in a proposed district is the proper measure rather than *voting age* black population. As set forth above, the petitioners took a contrary position in the lower courts. In any event, this is not a question which needs decision by this Court. The circuit courts and district courts which have looked at this question are unanimous in the view that the relevant inquiry is voting age black population, *see, Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989); *McNeil v. Springfield Park District*, 851 F.2d 937, 944-45 (7th Cir. 1988); *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739 (D.C. Mass. 1985), *aff'd* 784 F.2d 409 (1st Cir. 1986); *Gingles v. Edmisten*, 590 F. Supp. 345, 381 n.3 (E.D. N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). Any other interpretation would be irrational. The forced creation of a district without a voting age black majority would be ineffective in achieving the goals sought by the Voting Rights Act and would be needlessly destructive of state prerogatives. In view of the petitioners failure to prove the *Thornburg* precondition concerning white bloc voting, any review of this issue would be academic so far as these petitioners are concerned.

The last legal question the petitioners would have this Court review relates to the authority of a circuit court to

substitute its view of the law for the District Court's view of the law. As discussed above, the District Court looked at statewide voting data in attempting to determine whether white bloc voting existed in connection with petitioners' "line" challenge. In *Thornburg, id.* at p. 59, n.28, this Court imposed a requirement of district specificity in analyzing white voting behavior. This Court's decision in *Growe v. Emison*, —— U.S. ——, 113 S.Ct. 1075 (1993), extended the requirements of *Thornburg* to line fragmentation claims. The Fifth Circuit merely and correctly found that the District Court's line challenge analysis improperly relied on non-district specific voting data. The Fifth Circuit looked at properly district specific data and corrected the District Court as a matter of law. The authority of a circuit court to correct a district court's legal mistakes is fundamental. It has long been established that, if a finding of fact is derived from the application of an improper legal standard to the facts, it cannot stand. *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963). Certainly, it is not necessary for this Court to review this question.

IV. THIS COURT SHOULD NOT GRANT CERTIORARI ON THE BASIS OF ALLEGED FACTUAL ERROR BELOW.

The third Question Presented by petitioners is whether the Fifth Circuit erred by upholding a District Court factual finding. The petitioners contend that the District Court placed too much weight on the fact that in the predominantly white Central Supreme Court District two black Supreme Court candidates defeated well known white opponents, and that these victories were achieved with substantial white support. The District Court determined that in the Central District black candidates and voters enjoyed substantial electoral success in Supreme Court elections. This success was obtained because there was no legally significant white bloc voting in the Central District. The Fifth Circuit ruled that this finding was not

clearly erroneous and should not be disturbed. Even if this Court should view the evidence on this point differently than did the District Court, it is well settled that this Court does not sit to correct factual errors. Certiorari should not be granted on the question of whether the District Court assigned too much importance to the electoral success of black Supreme Court candidates.

V. GENERAL FACTUAL MATTERS WHICH SUPPORT DENIAL OF THE WRIT.

Many of petitioners' factual assertions set forth in their petition are inaccurate or incomplete. In accordance with Rule 15 of the Rules of the Supreme Court, respondents bring to the Court's attention the following inaccuracies:

(a) Petitioners state that the district lines dissect the black population of the state. (Pet. p. 3) The impression petitioners attempt to make is that the state's black population is fragmented by the district lines and that the lines were drawn to achieve this result. This is not the case. Over 46% of the state's black population reside in the Central Supreme Court District. If all contiguous counties or all contiguous precincts having substantial black population were added to the Central Supreme Court District, such district would still contain a white voting age majority population. Moreover, the district lines have remained basically unchanged since 1832. (Supp. App. 63sa) Also, petitioners voluntarily dismissed their constitutional claims alleging purposeful discrimination in the creation or maintenance of the current Supreme Court districts or method of electing justices. (Supp. App. 23sa)

(b) Petitioners assert that their expert analyzed several hundred elections over a period of 25 years. (Pet. pp. 4, 11) This is incorrect. Petitioners' expert analyzed a relatively small number of elections in a few areas of the state, for which he offered specific voting data. The apparent basis for this inflated number is petitioners' con-

tention that their expert analyzed the 1989 and 1990 trial court races and the 1991 legislative races. Dr. Lichtman's analysis of the trial court races was faulty since it consisted of a compilation of aggregated satistics, thus making it impossible to determine the degree of polarization in any given race. Dr. Lichtman offered no data or election returns in connection with the legislative races. His analysis of these elections is merely an observation that black candidates were running in and being elected from districts with substantial black populations.

(c) Petitioners contend that the District Court did not accept respondents' expert, Kathryn Hester, as an expert and political analyst in voting patterns. (Pet. p. 5) This is an inaccurate characterization. Ms. Hester had considerable experience in analyzing election returns. The District Court did accept Ms. Hester as an expert (Brief, App. 5a-6a) and did permit her to testify regarding her extreme case analysis of the Banks election and numerous other judicial races. (Supp. App. 50sa, 52sa-54sa) Moreover, respondents countered petitioners' stipulated expert testimony with its own stipulated expert testimony, which revealed that black and white voters do not generally prefer different judicial candidates, especially in Supreme Court elections.

(d) Petitioners state that the Fifth Circuit did not discuss the advantages Justice Banks had running as an incumbent. (Pet. p. 9) It is evident that the Fifth Circuit carefully examined the circumstances surrounding the elections of both Justice Reuben Anderson and Justice Fred Banks and concluded that the District Court had valid reasons for not discounting these elections. (Supp. App. 15sa) Both Justices Anderson and Banks had been incumbents for very short periods before their elections. Moreover, there was evidence before the District Court that such incumbency is a typical factor in Supreme Court elections. Also, petitioners assert that Justice Banks had to conduct a stealth campaign. Their own witness dis-

putes this allegation. Petitioners' expert in judicial campaign strategy, Bob Owens, testified that the accepted strategy for black candidates in judicial races is to avoid the media and not to campaign in the white community. However, in Justice Banks' case, white support was needed so they campaigned in the white community. (Pet. App. 36a) The District Court concluded that the races of Justice Banks and his white opponent, Judge "Chet" Dillard, were well known by the voters. (Supp. App. 55sa)

(e) Petitioners suggest that the Anderson and Banks elections should be discounted for the additional reason that they occurred during the pendency of this and related litigation. (Pet. p. 10) Unlike the situation before the District Court in *Gingles v. Edmisten*, 590 F. Supp. 345, 367 n. 27 (E.D. N.C. 1984), there was no evidence in this case that the defendants fielded Justice Anderson or Justice Banks for purposes of mooting the lawsuit. While such engineering might occur in local races with small constituencies, it is highly unlikely that such engineering could ever occur in races involving ⅓ of the state.

(f) Petitioners contend that certain election features in Supreme Court elections are dilutive of minority votes, i.e., numbered post provisions, anti-bullet voting requirements and majority vote requirements in primaries. (Pet. p. 9)

There is no anti-bullet vote requirement in Supreme Court races. Also, there was no evidence before the District Court that the majority vote requirement disadvantaged any black Supreme Court candidates. Finally, the District Court found that the petitioners had abandoned their challenge to the numbered post feature of Supreme Court elections. (Supp. App. 43sa) Petitioners had asked the District Court to take judicial notice of its findings in *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), with respect to the numbered post election feature in certain trial court districts. The District Court refused to do so, concluding that those findings were not relevant to

Supreme Court races. (Brief, App. 7a) Petitioners did not appeal this finding of the District Court. (Brief, App. 1a-3a) It is important to understand that post requirements are essential in Supreme Court elections so as to avoid having sitting justices running against one another while deciding the same cases.

CONCLUSION

At first blush this case may give the mistaken impression that it presents questions of large social importance. However, the simple reality is, as this case demonstrates, Supreme Court elections are not racially polarized. This reason alone makes clear that the appearance of social importance is exaggerated. The legal issues this case presents have long been settled. The procedural posture of this case is such that review should not be granted.

Respectfully submitted,

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Dated: November 2, 1993

APPENDICES

APPENDIX A

Issues Petitioners Raised In Fifth Circuit
(Brief For Appellants, Pages 1-4)

STATEMENT OF JURISDICTION

This is an appeal pursuant to 28 U. S. C. Section 1291 from a final judgment entered by the United State District Court for the Southern District of Mississippi denying plaintiffs relief pursuant to Section 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. Section, 1973 and 42 U. S. C. Section 1983.

The district court's jurisdiction was predicated upon 28 U. S. C. Sections 1331, 1343 (3) and (4), and 42 U. S. C. Sections 1973, 1973a, 1973 (a) (c), and 1973 (j) (f).

Statement Of Issues

The instant voting rights action presents issues regarding whether or not the district court's findings of fact were sufficiently detailed as required by Fed. R. Civ. P. 52 (a), whether or not the district court's findings of fact on critical and ultimate facts were clearly erroneous, whether or not the district court properly considered opinions and conclusions from a witness who was not qualified as an expert witness, and whether or not the district court properly applied the legal standard for determining minority vote dilution. The issues involved in this appeal are as follows:

1. Were the requirements of Fed. R. Civ. P. 52 satisfied when the district court reached a conclusion on the Zimmer factor of the extent of minority electoral success without discussing substantial relevant contrary evidence?

2. Were the requirements of Fed. R. Civ. P. 52 satisfied when the district court reached a conclusion on the Zimmer factor of whether or not the Supreme Court dis-

tricts are unusually large without discussing substantial relevant contrary evidence?

3. Were the requirements of Fed. R. Civ. P. 52 satisfied when the district court reached a conclusion on the Zimmer factor that the state policies that multi-member at-large districts utilizing staggered terms were not tenuous without discussing substantial relevant contrary evidence?

4. Should a district court rely heavily on the opinions and conclusions of a witness offered by a party as an expert witness when the court refuses to accept the witness as an expert in the field tendered?

5. Was the district court's finding of fact that "the election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that whites will not necessarily vote as a bloc for white candidates having black opponents in Mississippi Supreme Court elections so as to 'usually defeat the minority's preferred candidate" clearly erroneous under Fed. R. Civ. P. 52?

6. Was the finding of fact that black voters are apathetic and fail to exercise their obligation to vote clearly erroneous under Fed. R. Civ. P. 52.?

7. Was the district court's finding of fact that the state policy which allows the use of multi-member at-large districts in elections for judges on the Mississippi Supreme Court to staggered terms is not tenuous clearly erroneous under Fed. R. Civ. P. 52?

8. Was the finding of fact that plaintiffs did not prove their minority vote dilution claim with respect to the Central Supreme Court District of the State of Mississippi clearly erroneous under Fed R. Civ. P. 52?

3. Was the district court's finding of fact that the state policy maintaining the existing district lines in elections for judges on the Mississippi Supreme Court foreclosed plaintiffs' district lines vote dilution claim clearly erroneous under Fed. R. Civ. P. 52?

10. Was the district court's findings that the state policy of drawing Supreme Court districts along county lines foreclosed plaintiffs' district lines vote dilution claim clearly erroneous under Fed R. Civ. P. 52?

11. Was the district court's findings that plaintiffs failed to prove by a preponderance of the evidence that a second subdistrict with a black voting age majority could be created in plaintiffs' district lines vote dilution claim clearly erroneous under Fed R. Civ. P. 52?

12. Did the district court accord proper weight to the Thornburg and Zimmer factors established by plaintiffs in their Section 2 vote dilution line challenge claim?

13. Does a district court's reliance upon traditional remedies for a vote dilution claim preclude plaintiffs from proving a vote dilution claim utilizing the traditional remedies in the liability stage of the litigation when those remedies may not be offered at the remedial stage of the litigation?

14. Did the district court properly apply the law to the facts proven by plaintiffs in the instant case?

APPENDIX B

Petitioners' Position On Voting Age Population
(Trial Transcript, p. 326, February 27, 1992)

Rights Act allows the black voters the opportunity to decide when they want to select someone to office and not depend on the goodwill of white voters to say, okay, it's time for us now to allow another black.

THE COURT: All right.

MR. RHODES: The Supreme Court in *Thornburg*, as recognized by *Dickinson v. Indiana State Board of Elections*, stated that only a simple majority of eligible voters in a single district is required to establish liability. What Plaintiffs' expert Senator Kirksey testified to was—

THE COURT: As recognized in what? *Thornburg*?

MR. RHODES: *V. Gingles*.

THE COURT: All right. I know that one.

MR. RHODES: Cited in *Dickinson v. Indiana State Board of Elections*, a Seventh Circuit case, found at 933 F.2d 497, at page 503. And in the *Dickinson* case, the question was presented whether or not the Plaintiffs had to show that they could remedy the violation and the Seventh Circuit said no. In order to establish liability, only a simple majority of eligible voters in single district —single-member districts have to be black. You do not have to prove the remedy at the liability stage, just show that you can draw a single-member district.

THE COURT: That flies in the face of *Martin v. Allain*.

APPENDIX C

District Court's Ruling On Expert Qualifications Of Kathryn Hester (Trial Transcript, pp. 168-169, February 26, 1992)

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numbers from specific counties rather than any projection for other counties; is that correct?

MR. KIRCHMAYR: Well, I think she would give a—I don't know—I think she would give an opinion, Your Honor, based upon her review of the material that she's had, which could be a projection. And I think on the other side of the coin, Your Honor, I think that she would also indicate, especially on voter registration, the difficulty that is involved in coming up with a model or the exact figures without a complete massive re-registration in the state.

THE COURT: All right. What's bothering the Court is, Number 1, in *Thornburg v. Gingles* the Supreme Court made some very specific pronouncements as to types of methodology to be used in analyzing cases under the Voting Rights Act, and the admonition of the circuit court of this circuit as far as making sure that experts are, in fact, experts. The Plaintiff has not questioned the expertise of the witness in regard to analyzing statistical data or redistricting or drawing redistricting lines, and the Court certainly will recognize her in those areas. The Court has been questioning the third theory, and that is perhaps her expertise to analyze voting patterns and re-registration patterns. Her expertise in that area is not from specific training in statistics or political science or other social sciences. Her experience is not from working in those fields on a professional basis. Her expertise there derives from a practical working in the general area from having been active on a strictly political side of things rather than on academic or business research side. However, because her testimony is going to be somewhat limited in these fields and will be used to test a nonstandard

method advanced by Dr. Lichtman, the Court thinks the testimony would be helpful to the Court and will allow her to testify and give opinions. Why don't before we—I think that would then conclude your qualification testimony?

MR. KIRCHMAYR: Yes, Your Honor.

THE COURT: I presume that you now are ready to get into—

MR. KIRCHMAYR: The district lines, Your Honor.

THE COURT: Why don't we take a recess at this time and we will come back and start with the testimony. We will stand in recess until ten minutes of 11:00.

(Recess.)

THE COURT: All right. Mr. Kirchmayr.

DIRECT EXAMINATION
(CONTINUING)

BY MR. KIRCHMAYR:

Q. Ms. Hester, at our request, have you had any occasion to draw redistricting plans for the present Supreme Court districts?

APPENDIX D

District Court's Ruling That *Martin* Findings On Post System In Trial Court Elections Irrelevant (Trial Transcript, p. 121, February 25, 1992)

The Court finds that it should not take judicial notice that the post system in chancery and circuit court elections was tenuous as found in fact 35 on pages 1195 and 96, as that is simply not relevant to this lawsuit.

The Court is going to reserve a ruling in regard to the request to take judicial notice that in the Ninth Circuit Court District, two judges are elected and voters can single-shot vote for one candidate. It is the Court's understanding that the parties are going to see whether they can reach a stipulation that is satisfactory to both sides regarding that particular issue. If not, the Court will consider a further request regarding those issues at a later time.

Mr. Rhodes, I believe that covers all the issues that the Plaintiffs requested the Court to take judicial notice of?

MR. RHODES: I apologize to the Court, Your Honor. I overlooked one additional. It was at the time of the opinion in *Martin v. Allain*. We would ask the Court to take judicial notice of fact 26 concerning racially polarized voting.

THE COURT: 26?

MR. RHODES: Yes, sir.

THE COURT: All right.

MR. KIRCHMAYR: Your Honor, we object to that for

APPENDIX E

Petitioners' Election Not To Challenge Finding That BVAP Majority Subdistricts Could Not Be Created In Northern And Southern Supreme Court Districts (Brief For Appellants, p. 19)

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could be maintained only in an east-west line configuration is tenuous.

Plaintiffs proved that a majority black VAP (voting age population) single-member district could be created within the existing Central Supreme Court District [10], black voters are politically cohesive, and white bloc voting is legally significant within the Central District.[11]

Busbee agreed, that a turnover of almost one half of the Supreme Court could occur this election year, and it is possible that there could be a wholesale turnover on the Supreme Court in any given few years. [Tr. 146-147, 270]. Additionally, staggered terms could be maintained if the Supreme Court was divided into nine single-member districts.

The court has found that "the policy of post system elections in multi-judge chancery circuit and county court judicial districts is tenuous." *Martin v. Allain*, 658 F. Supp. 1183, 1195-96 (S. D. Miss. 1987). The policy of numbered posts with respect to Supreme Court elections is the same as the policy with respect to Circuit and Chancery Court elections. If it is tenuous for one it is tenuous for all.

[10] Plaintiffs offered proof that majority black single-member districts could be created within the Northern and Southern Supreme Court districts as well. [Tr. 71]. Defendants offered proof that such districts could not be created. [Tr. 178-180]. Since there were two competing plausible views of the evidence on this issue, and the district court weighed this evidence against plaintiffs, plaintiffs do not challenge that finding on appeal. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985); *Mississippi State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 410 (5th Cir. 1991).

[11] See Footnote 5 and accompanying text.